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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-192988

DATE: July 11, 1979

MATTER OF: Honeywell, Inc.

CNG 00308

DIGEST:

1. Where bid form provided spaces for unit prices, extended prices and a total price and award on basis of total price was permitted, bid setting forth price for nonrecurring costs above extended prices for quantities to be incrementally funded clearly reflected intent such nonrecurring costs should be added to extended price for first quantity funded. As extended price was readily ascertainable from bid and total price was low, acceptance of bid as responsive was proper.
2. Protest issues based upon improprieties apparent on face of the IFB will not be considered because protest was not filed before the bid opening date as required by Bid Protest Procedures. Although untimely issues are not of such importance to the competitive procurement process as to warrant consideration under the significant issue exception, allegation of Anti-Deficiency Act violation merits comment.
3. Contract using funds without fiscal year limitation and providing for purchase of additional items only if funds become available in future and agency, after determination that it is in interest of Government to do so, allots such funds to contract does not violate the Anti-Deficiency Act where contractor is not required by contract or otherwise to perform in advance of allotment of such funds.

AGC 00694
DLG 00814

Honeywell, Inc. (Honeywell), protests award of a contract to Bell and Howell Company (Bell) by the Naval Air Development Center, U.S. Navy (Navy) under invitation for bids (IFB) No. N62269-78-50-80161. Honeywell

[ALLEGATION THAT Competitor's Bid
... was Responsive

00583

contends that Bell's bid was nonresponsive, the procurement violated 10 U.S.C. § 2305 (1976), and the contract awarded violates the Anti-Deficiency Act, 31 U.S.C. §§ 665 and 712(a) (1976) and 41 U.S.C. § 11 (1976) as well as the Defense Acquisition Regulation (DAR). For reasons discussed below, this protest is denied.

Although the second step of this two-step formally advertised procurement required prices for 15 different line items, this case requires discussion of only line item 1, which called for 21 sound recorders. The IFB, as amended, stated that for bidding purposes, the bidder shall assume that the Government will fund item 1 as follows:

"J163 ESTIMATED FUNDING DATES

ITEM NUMBER	FUNDING DATE
0001 4 EA	Effective date of contract
1 EA	12 months after effective date of contract
16 EA	1 NOV 1981"

The IFB also provided:

"In the event funds become available in a time which substantially differs from the dates shown above, the parties to the contract reserve the right to negotiate an equitable adjustment in price which will be reflected in a supplemental agreement to the contract. It is further understood and agreed by the parties that the Government need not fund all the line items, if to do so is not in the best interests of the Government. It is further agreed that this provision does not waive any rights of the Government under the clause in the contract entitled 'Limitations of Government's Obligation'."

Opening of the bids on September 15, 1978 revealed Honeywell's total bid (15 line items) was \$4,300,000 and Bell's bid was \$4,064,447. For line item 1, Bell's

extended bid price for the 21 recorders was \$2,623,324 and Honeywell's price was 2,573,233. In the space on the schedule provided for a unit price, each referred to a separate breakdown of prices, as follows:

BELL

Non-recurring Engineering for design modifications		\$ 741,274
4 SSRS	\$91,654.00 EA	366,616
1 SSRS	98,070.00 EA	98,070
16 SSRS	88,758.50 EA	1,420,136
	(TOTAL)	(\$2,626,096)

HONEYWELL

4 SRRS	\$298,864. EA	\$1,195,456
1 SRRS	\$107,505. EA	107,505
16 SRRS	\$ 79,392. EA	1,270,272
	(TOTAL)	(\$2,573,233)

The solicitation permitted a single award for all items, and the Navy awarded a contract to Bell on September 22, 1978. Although the contract specified a total contract price of \$4,064,447, only \$1,246,157 was allotted to the contract under the "Limitations of Government's Obligation" clause, including \$1,107,890 for Item 0001 (4 Ea.). The Navy calculated the \$1,107,890 for Item 0001 by adding Bell's nonrecurring engineering costs of \$741,274 to the \$366,616 quoted for the 4 units.

Honeywell initially contends that this allocation of nonrecurring costs to the first 4 units was unwarranted because there was no evidence in the bid to indicate that this was intended by Bell. It asserts that there are other equally reasonable methods of allocating the nonrecurring costs, each of which would also have required the unauthorized restructuring of Bell's bid and would have resulted in a unit price not quoted by Bell. Honeywell argues that the allocation method chosen by the Navy was most favorable to Bell because it results in the earliest recovery of non-recurring costs. Honeywell also states that it could

have bid lower if it had been permitted to bid non-recurring costs as a separate line item to be allocated in the first unit or units purchased. It argues that the contract funding could have been allocated solely to the single unit, the 16 units or the 4 units, depending upon the amount of available funds. It believed that compliance with the solicitation's format forced inclusion of nonrecurring costs in each of the above three categories.

The Navy disclaims any ambiguity in the IFB or as to Bell's intended bid for the 4 units funded because the extended price could be accurately ascertained from the bid itself. In the alternative, the Navy argues that if the separate price for nonrecurring costs was a deficiency, it was merely a matter of form which could be waived under DAR § 2-405, as having no effect or merely trivial or negligible effect on price, quality, quantity or delivery, without prejudice to Honeywell, the only other bidder.

Bell points out that although not required, both Bell and Honeywell chose to provide price breakdowns. It asserts that the more meaningful supplementary information provided by Bell does not logically lead to the conclusion that the invitation or Bell's bid was ambiguous or otherwise defective.

In determining Bell's extended price for the 4 units the Navy concluded that Bell intended to recoup its nonrecurring costs on the initial 4 units rather than over the 21 units. We agree with the Navy's interpretation. Moreover, although Honeywell states it allocated nonrecurring costs over the three quantity categories, its unit price of \$298,864 for the 4 units as compared to \$79,392 each for the 16 units suggests that the bulk of its nonrecurring costs was added to the production costs of the 4 units. It also indicates, we think, that Honeywell did not have any serious concern about the Navy funding the categories out of sequence. In any event, as the IFB stated that the anticipated funding dates for the groups of 4, 1 and 16, were the contract award date, 12 months thereafter and November 1, 1981, respectively, we believe the Navy clearly committed itself to this sequence. Thus, we cannot detect any prejudice to Honeywell.

In Truland Corporation, B-190242, March 8, 1978, 78-1 CPD 183, which Honeywell cites, it was impossible to determine from the face of the bid whether Truland intended to include or exclude its price for spare parts from the base price. As a result, the low bidder could not be determined with certainty. We held that because this ambiguity arose from the "inartful and ambiguous" wording of the solicitation, cancellation of the IFB was proper. While the solicitation here should have provided instructions for recovery of nonrecurring costs, the failure to do so did not result in any reasonable ambiguity as to the bid prices intended by Bell or Honeywell.

Honeywell contends that the Bell contract may violate the Anti-Deficiency Act because the Navy only has funds for 4 of the 21 units. It argues that if the contract is only for the 4 units funded, the additional 16 units which may be ordered under the contract are in the nature of options which, under DAR 1-1505, may not be exercised by the Navy without testing the market. In Honeywell's view, the Navy is either violating the Anti-Deficiency Act or evading the requirement in DAR 1-322.2(c)(iv) for "uniform unit prices" in multi-year requirements.

The Navy argues that this aspect of the protest is untimely in that the protester participated in the competition but did not complain of the alleged defect in the solicitation until another bidder was revealed to be low. We agree that this aspect of the protest is untimely for the reason stated by the Navy. 4 C.F.R. 20.2(b)(1). Furthermore, we believe these issues are not of such widespread interest as to warrant consideration under the significant issue exception to our procedures, 4 C.F.R. 20.2(c). However, we believe that the question whether the contract violates the Anti-Deficiency Act merits comment.

Under the "Limitation of Government's Obligation" clause of the contract the Government is only obligated to the contractor for the funds allotted to the contract. As indicated above, the clause provides that the sum of

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\$1,246,157 is allotted to the contract, that the Government may from time to time allot additional funds until the total contract price is allotted, and that "the Government will not have any further monetary obligation to the contractor in the event that no additional funds become available, the 'Termination for the Convenience of the Government' clause notwithstanding." In addition, we are advised by the Navy that the funds covering the contract are not fiscal year funds. Therefore, we find no basis to conclude that the contract violates the Anti-Deficiency Act.

The protest is dismissed in part and denied as to the remainder.


Deputy Comptroller General
of the United States